



Physicians Caring for Texans

November 6, 2023

Submitted electronically to chiefclerk@tdi.texas.gov

Office of the Chief Clerk
MC: GC-CCO
Texas Department of Insurance
P.O. Box 12030
Austin, TX 78711-2030

Re: Proposed amendments to 28 TAC Chapter 21, Subchapter T, § 21.2819, relating to prompt pay deadlines during a catastrophic event, as published in the Texas Register on October 6, 2023, at 48 Tex. Reg. 5819, et seq.

Dear Chief Clerk:

On behalf of over 57,000 physician and student members, the Texas Medical Association (“TMA”) expresses its appreciation for the opportunity to provide comment on the Texas Department of Insurance (“TDI” or the “Department”) proposed amendments to 28 TAC Chapter 21, Subchapter T, relating to prompt pay deadlines during a catastrophic event. TMA is a private, voluntary, non-profit association of Texas physicians and medical students and was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is “Improving the Health of all Texans,” and its mission is “Empowering Texas Physicians in the Practice of Medicine.”

As TDI stated in the preamble of the rule proposal, the proposed amendments implement Senate Bill 1286 of the 88th Legislature, Regular Session (“SB 1286”), a TDI biennial recommendation to the Legislature to help resolve questions raised during the COVID-19 pandemic about the extension of various prompt payment deadlines during a catastrophic event.¹ TDI’s biennial recommendation sought to “clarify (1) the standards for entities requesting extensions to prompt pay deadlines; (2) the duration of the extensions; and (3) TDI’s authority to approve, limit, or disapprove requests.”² This rule proposal sets out to implement SB 1286 and to provide needed clarity in the process for requesting and receiving prompt payment deadline extensions.

Because the proposal pertains to the submission of clean claims and prompt payment, TMA has great interest in ensuring that the rules: (1) conform to the underlying statutory authority and (2) provide regulatory clarity to the standards and processes for receiving an extension of prompt payment

¹ 48 Tex. Reg. 5819, 5819 (2023) (explaining the background and purpose of the rule proposal).

² *Id.*

deadlines due to a catastrophic event. TMA offers the following specific comments on the rule proposal:

I. Proposed Amendments to Section 21.2819. Catastrophic Event.

First, as a more generalized comment, TMA recommends that TDI more closely track the text of the underlying statutory authority in order to better differentiate between the two types of TDI-involved prompt payment extensions permitted under SB 1286.

Under Senate Bill 1286, the period for submitting or processing a clean claim may be extended by (1) a *notice* published by TDI *allowing* an extension of prompt pay deadlines, or (2) the department's *approval* of an entity's *request* for an extension of prompt pay deadlines.

These two methods have some key differences. First, they differ in terms of scale. The first method involves a catastrophic event so widely known (e.g., a hurricane) that the Department is aware of the event and subsequently publishes a notice allowing an impacted entity to extend their applicable prompt payment deadlines. The second method involves the Department's issuance of extensions for smaller-scale catastrophes (e.g., a fire or accident) on a case-by-case review and approval of a particular entity's request to extend prompt payment deadlines. This would be due to an event that did *not* prompt the Department to publish a notice related to the event.

Second, they differ in terms of processes. The first method involves a notice and the second a TDI-approved request. A "notification" and a "request" are not synonymous. A "notification" commonly refers to "[a written or printed matter that gives] a warning or intimation of something, [an] announcement,"³ while a "request" commonly refers to "the act or an instance of asking for something."⁴ The former refers to *informing* another party of something, whereas the latter refers to *asking* another party for something.

Third, although both require interference with claims processing and/or submissions in order to qualify for an extension (as reflected in TDI's current definition of a "catastrophic event"), which the Legislature was aware of at the time of passage of SB 1286 (and which TDI does not propose to now change), only the second also expressly references "substantial interference with the normal business operations of the physician, provider, or MCC."

Thus, for statutory compliance and basic clarity within the rule, we request that these two avenues be separated into a notification prong (for catastrophic events related to a notice published by the commissioner) and a request prong (for catastrophic events when a commissioner's notice is not applicable).

a. Suggested clarification to proposed Section 21.2819(a).

Specifically, we recommend that TDI modify subsection (a) as follows in order to more clearly differentiate between the two TDI-involved extension methods:

§21.2819 Catastrophic Event.

³ See *notification*, MERRIAM-WEBSTER DICTIONARY, available at, <https://www.merriam-webster.com/dictionary/notification>; see also *notice*, MERRIAM-WEBSTER DICTIONARY, available at, <https://www.merriam-webster.com/dictionary/notice>.

⁴ See *request*, MERRIAM-WEBSTER DICTIONARY, available at, <https://www.merriam-webster.com/dictionary/request>.

(a) ~~[An MCC, a physician, or a provider must notify the Texas Department of Insurance (TDI) [department] [i]If, due to a catastrophic event, an MCC, a physician, or a provider [it] is unable to meet the deadlines in §21.2804 of this title (relating to Requests for Additional Information from Treating Preferred Provider), §21.2806 of this title (relating to Claims [Claim] Filing Deadline), §21.2807 of this title (relating to Effect of Filing a Clean Claim), §21.2808 of this title (relating to Effect of Filing [a] Deficient Claim), §21.2809 of this title (relating to Audit Procedures), and §21.2815 of this title (relating to Failure to Meet the Statutory Claims Payment Period), as applicable, the entity must send a request described by this section or a notification described by this section, as applicable, to the Texas Department of Insurance (TDI). The entity must send [the notification required under this section] [subsection] to TDI: [the department]~~

(1) a request described in this section, within five days of the date the catastrophic event began substantially interfering with the normal business operations of the entity, or

(2) a notification described in this section, as specified in a notice published by the commissioner regarding the catastrophic event.

Additionally, while not reflected in TMA’s recommended edits to subsection (a), above, TMA has some additional concerns with the proposed language as the timeframes for required notices under the rule proposal are not as easily ascertainable as those currently found in TDI rules. Under current TDI rules, an MCC, physician, or provider who is unable to meet prompt pay deadlines is required to notify the Department within five days of the catastrophic event (with a “catastrophic event” being defined as an event that can’t be reasonably controlled or avoided and that causes an interruption of an entity’s claims submission or processing activities for more than two consecutive business days). In most instances, this will be a readily determinable date.

In contrast, the rule proposal changes this date certain to a less readily identifiable date (i.e. (1) within five days of the date the catastrophic event began substantially interfering with the normal business operations of the entity; or (2) as specified in a notice published by the commissioner regarding the catastrophic event).

It could be more difficult for TDI to assess whether a notice has been timely filed (and more difficult for MCCs, physicians and providers to understand filing deadlines) with the change in the rule proposal requiring an entity to determine at what point a catastrophic event began substantially interfering with the normal business operations of the entity. This is true as determining what constitutes a “substantial interference with the normal business operations of an entity” and when it “began,” will likely be a judgment call.

While TMA understands that this language may have been included due to the pandemic affecting business operations at different times, TMA queries how TDI plans to implement this language to ensure prompt notices continue to be provided.

Further, if the impetus for this proposed change was the pandemic, TMA notes that the more generalized commissioner’s notice prong would likely be the avenue taken for prompt pay deadline extensions, rather than the entity-specific extension request avenue. If that is the rationale for this change, the proposed amendment may not be needed for entity-specific extension requests.

Finally, TMA also notes that it is important that a MCC, physician, or provider promptly notify TDI when it seeks to avail itself of the extension allowed by a notice published by the commissioner. Thus, TMA seeks clarification from TDI that, even in instances of publication of a notice, it will provide reasonable and prompt timelines for when a notification must be submitted by an MCC, physician, or provider.

b. Proposed amendments to Section 21.2819(b).

TMA notes that the Department should also revamp the proposal in subsection (b) to create two separate processes: one for an entity notifying TDI they are availing themselves of a notice published by TDI, and one for an entity requesting a prompt pay deadline extension that must be approved by TDI.

i. Suggested notification process for a catastrophic event identified in a notice published by the commissioner of TDI.

The process for an entity notifying TDI that they are availing themselves of a prompt payment deadline extension described in a notice published by TDI should focus on, *in addition to other edits reflected in our recommended changes to subsection (b)*, below: the identity of the entity, the physical location of the entity, contact information for the entity, a statement demonstrating that the catastrophic event specified in TDI's notice is the same one impacting the entity, and a statement specifying the date when the catastrophic event first interrupted the claims submission or processing activities of the entity.

Upon receiving an entity's notification, TDI should ensure the entity was in fact impacted by the catastrophic event specified in the commissioner's notice and/or that the entity is located within the geographic location affected by the catastrophic event specified in TDI's notice. If these cannot be verified, TDI should ask for more information. If the entity was not impacted by the catastrophic event (e.g., is located outside the geographic area and/or has not had claims processing or submissions affected) specified in TDI's notice, TDI should inform the entity that the extension of prompt payment deadlines listed in TDI's notice does not apply to that entity.

ii. Suggested request process for an extension due to a catastrophic event that substantially interferes with the normal business operations of an entity.

As noted above, the Legislature gave TDI the authority to approve or deny an entity's request for an extension of prompt pay deadlines due to a catastrophic event that substantially interferes with the normal business operation of an entity.

TDI currently defines "catastrophic event" as "[a]n event, including an act of God, civil or military authority, or public enemy; war, accident, fire, explosion, earthquake, windstorm, flood, or organized labor stoppage, that cannot reasonably be controlled or avoided *and that causes an interruption in the claims submission or processing activities of an entity for more than two consecutive business days.*" 28 T.A.C. § 21.2802(5) (emphasis added). The terms "substantially interferes" and "normal business operations" are not currently defined by TDI. Thus, TDI must interpret these terms and either define them or put forth a framework detailing how TDI will determine what it means for a catastrophic event to "substantially interfere with the normal business operations of [an entity]."

In its current proposal, TDI chose not to define "substantially interferes" or "normal business operations." Instead, it puts forth a framework that relies on entities seeking an extension to submit

requests that detail several factors about the catastrophic event, including: the specific nature of the catastrophic event, when it first caused an interruption in the claims submission or processing activities of the entity, when the entity expects to resume normal business operations, a statement that the catastrophic event is substantially interfering with the entity's normal business operations, identifying information for the entity, and the physical address of each business or practice location affected by the catastrophic event. From this it can be gleaned that TDI will consider each request on a case-by-case basis to determine whether the complained of "catastrophic event" "substantially interfered" with the "normal business operations" of the entity.

However, the proposal is not transparent in how TDI will analyze and consider each factor described in an entity's request when it determines whether to approve, limit, or disapprove a request. It is simply a judgment call left for TDI to determine on a case-by-case basis. The only window into TDI's case-by-case analysis appears to be Section 21.2802(5)'s existing definition of "catastrophic event."

We must assume the Legislature was aware of TDI's definition of "catastrophic event" when it debated and ultimately passed SB 1286. This is supported by the fact that TDI's biennial recommendation to the Legislature included TDI's current definition of "catastrophic event"⁵ and that Texas courts have consistently held, "[a] statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it."⁶ We must also presume that the Legislature chose to couch "catastrophic event" next to the terms "substantially interferes/substantial interference" and "with the normal business operations of [an entity]" in Sections 843.337(c)(3), 843.342(h)(1)(B), 1301.102(e)(3), and 1301.137(h)(1)(B) of the Insurance Code—deliberately and purposefully.⁷

This suggests that a "catastrophic event" that substantially interferes with the normal business operations of [an entity]" must be one that affects non-claims-submission and non-processing-activities of an entity *in addition to* an interruption of the claims submission or processing activities of an entity for at least two consecutive business days. Otherwise, there would be no need for the legislature to attach the phrase, "that substantially interferes with the normal business operations of [an entity]" to the request prong and not also attach it to the notice-published-by-the-commissioner prong in Sections 843.337(c)(2), 843.342(h)(1)(A), 1301.102(e)(2), and 1301.137(h)(1)(A) of the Insurance Code.⁸

In light of this construction, the Legislature directed TDI to promulgate rules that enable TDI to approve or deny an entity's request for an extension due to a catastrophic event (an event that cannot reasonably be controlled or avoided that causes an interruption in claims submission or processing activities of an entity for more than two consecutive business days) that substantially interfered with the normal business operations of the entity. Thus, TDI's rule should acknowledge that approvals of prompt payment deadline extension requests are conditioned upon catastrophic events (an event that cannot reasonably be controlled or avoided that causes an interruption in claims submission or processing activities of an entity for more than two consecutive business days) that *also* impact non-claims-submission or non-processing-activity business operations of the entity.

⁵ See 2022 Biennial Report, TEXAS DEPARTMENT OF INSURANCE (Dec. 2022), p. 6, available at, <https://www.tdi.texas.gov/reports/documents/biennial-report.pdf>.

⁶ See *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (quoting *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex.1990)).

⁷ See *Hogan v. Zoanni*, 627 S.W.3d 163, 169 (Tex. 2021), *reh'g denied* (Sept. 3, 2021) (noting Texas courts "must presume the Legislature chose statutory language deliberately and purposefully and that it likewise excluded language deliberately and purposefully").

⁸ *Id.*

To implement TMA's suggested changes above (and additional changes discussed below our recommended language), TDI should amend Section 21.2819 by amending subsection (b) and adding subsection (b-1) to read as follows:

(b) In the event the commissioner publishes a notice allowing an extension of prompt payment deadlines to a later date due to a catastrophic event, [A]n [Within 10 days after the entity returns to normal business operations, the] impacted entity must [send the] submit a notification [required under this section] [a certification of the catastrophic event] to TDI [the Texas Department of Insurance] by email to PromptPay@tdi.texas.gov, unless an alternative electronic method is provided by TDI for a specified event [promptpay@tdi.texas.gov], notifying TDI that the entity will utilize the extension of prompt payment deadlines to a later date as specified in the notice published by the commissioner. The notification [certification] must:

(1) be in the form of a sworn affidavit from:

(A) if for a physician or a provider, the physician, [the] provider, [the] office manager, [the] administrator, or their designee [designees]; or

(B) if for an MCC, a corporate officer or a corporate officer's designee;

(2) identify the specific nature [and date] of the catastrophic event and provide information that demonstrates the catastrophic event impacting the entity is the same one specified in the notice published by the commissioner and that the physician, provider, or MCC falls within the scope of the commissioner's notice; [and]

(3) identify the first date [length of time] the catastrophic event caused an interruption in the claims submission or processing activities of the physician, [the] provider, or [the] MCC; [-]

[4) identify the date the physician, provider, or MCC expects to resume normal business operations;]

(4) state that the catastrophic event is interrupting the claims submission or processing activities of the physician, the provider, or the MCC [with the entity's normal business operations];

(5) identify the date the physician, provider, or MCC reasonably expects the interruption to claims submission or processing activities to cease;

(6) include the contact information for the physician, provider, or MCC, including each entity's name, email address, phone number, and:

(A) if for a physician or provider, the national provider identification number; or

(B) if for an MCC, the entity's NAIC number;

(7) include the physical address of each business or practice location affected by the catastrophic event;

(8) include a statement that the physician, provider, or MCC will inform TDI that their claims submission or processing activities are no longer being interrupted within five days of the interruption ceasing to exist; and

(9) include a statement that the physician, provider, or MCC will take reasonable steps to mitigate the effects of the catastrophic event.

(b-1) If an entity is impacted by a catastrophic event and the commissioner has not published a notice described in subsection (b), the entity may submit a prompt payment deadline extension request to TDI by email to PrompyPay@tdi.texas.gov. The request must:

(1) be in the form of a sworn affidavit from:

(A) if for a physician or a provider, the physician, provider, office manager, administrator, or their designee; or

(B) if for an MCC, a corporate officer or a corporate officer's designee;

(2) identify the specific nature of the catastrophic event;

(3) identify the first date the catastrophic event caused an interruption in the claims submission or processing activities of the physician, provider, or MCC;

(4) identify the date the physician, provider, or MCC reasonably expects the interruption in the claims submission or processing activities of the physician, provider, or MCC to cease;

(5) state that the catastrophic event is interrupting the claims submission or processing activities of the physician, the provider, or the MCC;

(6) state if and how the catastrophic event is interfering with the physician's, provider's, or MCC's business operations that are not related to claims submission or processing activities;

(7) include the contact information for the physician, provider, or MCC, including each entity's name, email address, phone number, and:

(A) if for a physician or provider, the national provider identification number; or

(B) if for an MCC, the entity's NAIC number;

(8) include the physical address of each business or practice location affected by the catastrophic event;

(9) include a statement that the physician, provider, or MCC will inform TDI that their claims submission or processing activities are no longer being interrupted within five days of the interruption ceasing to exist; and

(10) include a statement that the physician, provider, or MCC will take reasonable steps to mitigate the effects of the catastrophic event.

...

TMA's suggested language for subsections (b) and (b-1) clearly differentiates between the Legislature's two TDI-involved methods of receiving a prompt payment deadline extension and separates the rule into a notification prong (for catastrophic events related to a notice published by the commissioner of TDI) and a request prong (for catastrophic events when a commissioner's notice is not applicable). This approach tracks the language of SB 1286 and implements the prompt payment deadline extension process in a clear and understandable manner.

It also requires entities submitting notifications or requests to do so in the form of a sworn affidavit. This reinstates a requirement that currently exists under TDI rule, which TDI proposes to delete through this proposal.

The Department's stated rationale for its proposed deletion is that the sworn affidavit is "an unnecessary additional expense to entities that are experiencing administrative challenges."⁹ However, having the notification or request notarized in the form of a sworn affidavit has little associated cost (particularly if TDI were to provide a standardized form) and is critically important for ensuring accountability for information submitted to TDI (since submitted information provides the basis for tolling important prompt pay deadlines).

These notifications and requests to TDI must be accurate in order for TDI to make decisions based on the information contained within them and to trigger the tolling under the law. Without the sworn affidavit, a bad actor could submit false or inaccurate information within the notice/request with less recourse and/or could be more likely to submit multiple, consecutive unnecessary prompt pay deadline extension requests/notices to toll the applicable prompt pay deadlines, indefinitely. If adopted as currently proposed (with the sworn affidavit requirement removed), TDI may also incur a larger (and avoidable) administrative burden to timely reject or disapprove such repeated, bad faith requests.

Further, an MCC unnecessarily delaying payments to physician practices (through improper extensions) would completely undermine the Legislature's intent in enacting the prompt payment law itself and would have serious physician practice viability consequences (which ultimately harms patient access to care). It is, therefore, imperative that TDI take reasonable measures to guard against this result (and to adopt rules to grant only necessary extensions of prompt payment deadlines consistent with the language of the law). Doing this should, at a minimum, include retention of the sworn affidavit requirement in the rule proposal.

TMA's recommended language in (b) and (b-1) also addresses concerns that TMA has with proposed subsection (b)(4), which provides that the MCC, physician or provider is required to identify the date they expect to resume normal business operations. TDI appears to have proposed this language in lieu of the current rule's requirement that the MCC, physician or provider provide a valid certification to the occurrence of the catastrophic event within 10 days after the entity returns to normal business operations.

TMA has serious concerns with TDI's proposed (b)(4) construct, as this language (in combination with TDI's proposed lack of a sworn affidavit requirement) is likely to encourage MCCs to overstate the expected timeframe for resuming normal business operations (in order to obtain a longer approval period and game the law's prompt pay timelines). Thus, TMA contends that in addition to maintaining the sworn affidavit requirement, it is important for TDI also to: (1) require entities to

⁹ 48 Tex. Reg. 5819, 5819 (2023)

identify the date, the physician, provider, or MCC reasonably expects the interruption in the claims submission or processing activities of the physician, provider, or MCC caused by the catastrophic event to cease; (2) for requests (as opposed to TDI notices), to state if and how the catastrophic event is interfering with the physician's, provider's, or MCC's normal business operations that are not related to claims submission or processing activities; and (3) institute a new requirement that the MCC, physician, or provider, promptly inform TDI if an extension is in place and they: (a) have ceased having an interruption in claims submission or processing activities that were caused by the catastrophic event; or (b) for requests, are no longer having normal business operations being substantially interfered as a result of the catastrophic event. The prompt pay deadline extension should automatically terminate as of the earlier of those dates (even if a longer timeframe was approved by the TDI request).

Finally, TMA's recommended language for subsections (b) and (b-1) also requires entities to take reasonable steps to mitigate the impacts of the catastrophic event so to not encourage indifferent or lackadaisical attempts to return to regular claims submission or processing activities until the end of an extension.

c. Suggested amendments to Section 21.2819(c).

We note Section 21.2819(c), as proposed, would allow prompt payment deadlines to be tolled until TDI disapproves a request. This is concerning as there is no incentive for TDI to timely approve or disapprove a request—and if TDI fails to act—this language would allow prompt payment deadlines to be tolled indefinitely. Most concerning, proposed Section 21.2819(c) is inconsistent with statutory language that explicitly states entity-specific requests for deadline extensions may only be extended by “the department’s approval.”

Section 21.2819(c)'s allowance of a preemptive tolling period before any TDI approval appears to have been created by combining the rule's current post-hoc certification process with SB 1286's language that sought to remove any confusion regarding the process for requesting and receiving extensions. We remind the Department that the statutory language is clear: the Department must approve an entity's request before any extension or tolling is allowed. Thus, we recommend TDI amend Section 21.2819(c) to comport with the statutory requirements.

We also recommend that the Department modify the language to provide that if the extension is granted based upon a TDI notice, the end date for counting the days for tolling must be *the earlier of*: (1) the date, the physician, provider or MCC ceased having claims submission or processing activities interrupted due to the catastrophic event; or (2) the date specified in the notice published by the commissioner.

And, if a request is granted based upon approved by TDI (rather than a notice published by the commissioner), the end date for counting the days for tolling must be *the earlier of*: (1) the date listed in TDI's approval of a request; (2) the date the catastrophic event ceased substantially interfering with the normal business operations of the physician, provider, or MCC; or (3) the date the catastrophic event stopped causing an interruption in the claims submission or processing activities of the physician, provider, or MCC.

Since TDI has changed its rule proposal to require all information to be provided upfront (instead of requiring a second notification/certification on the back end), it is possible that TDI may be unintentionally overly generous in granting an extension of the prompt pay deadline. The prompt pay deadline extension should not be permitted to last any longer than needed. Thus, if normal

business operations resume or claims processing/claims submission are no longer interrupted, the extension should be discontinued (even if the TDI approval were for a longer period).

Again, for physician practice viability and patient access to care, it is important for MCCs to comply with prompt pay deadlines. An extension should only be granted for as long as absolutely necessary.

To implement TMA's suggestions above, TDI should amend 28 TAC 21.2819 by amending subsection (c) to read as follows:

- (c) A valid notification or an approved request [~~valid certification to the occurrence of a catastrophic event~~] under this section tolls the applicable deadlines in §§21.2804, 21.2806, 21.2807, 21.2808, 21.2809, and 21.2815 of this title for the number of days between the date identified in subsection (b)(3) or (b-1)(3) of this section and:
- (1) if the extension is granted based upon a notice published by the commissioner, the earlier of:
 - (A) the [any] date specified in the notice published by the commissioner;
 - (B) the date the physician, provider, or MCC ceased having claims submission or processing activities interrupted due to the catastrophic event; or
 - (2) if the extension is granted based upon a request approved by TDI, the earlier of:
 - (A) the date listed in TDI's approval of a request;
 - (B) the date normal business operations of the physician, provider, or MCC were no longer substantially interfered with due to the catastrophic event; or
 - (C) the date the physician, provider, or MCC ceased having claims submission or processing activities interrupted due to the catastrophic event. [as of the date of the catastrophic event.]

d. Suggested amendments to Section 21.2819(d).

Like our comments above, we note Section 21.2819(d) conflates a “notification” with a “request.” We thus recommend that amendments to subsection (d) are necessary to conform with the suggested changes made to subsections (a), (b), and (b-1) of Section 21.2819. However, in the event those suggestions are not accepted, we suggest, at the very least, that TDI use consistent terms within this subsection and not conflate a “notification” with a “request.” Additionally, we note that TDI uses the term “substantially impair” in lieu of “substantially interfere” in subsection (d). For consistency throughout the rule, we request subsection (d) be amended and subsection (d-1) be added, to read as follows:

(d) If a catastrophic event continues to interrupt the claims submission or processing activities of a physician, provider, or MCC past the date in a notice published by the commissioner, [or in TDI's approval of an extension request, then] the physician, provider, or MCC must send a [n additional notification] request meeting the requirements of subsection (b-1) [this section] to TDI at least three business days before the expiration of the existing extension. The [new notification] request must explain why an additional extension is needed.

(d-1) If a catastrophic event continues to interrupt the claims submission or processing activities of the physician, provider, or MCC and substantially [*impair*] interferes with the physician's, provider's, or MCC's normal business operations past the date [in a notice published by the commissioner or] specified in TDI's approval of an extension request, then the physician provider, or MCC must send an additional request [notification] meeting the requirements of

subsection (b-1) [this section] to TDI at least three business days before the expiration of the existing extension. The new request [notification] must explain why an additional extension is needed.

e. Suggested amendment to Section 21.2819(e).

We also ask that TDI make the following changes to subsection (e) of Section 21.2819 to conform with the suggested changes made to subsections (a), (b), and (b-1) of Section 28.2189. Additionally, as there is no current or proposed definition of “a catastrophic event that substantially interferes with the entity’s normal business operations,” we recommend separating this “definition” into two separate conditions that must be met, as suggested below.

(e) TDI will contact the physician, provider, or MCC if more information is needed for any notification or request received. A notification is not valid and TDI will not recognize notifications submitted by an entity that is not subject to the parameters or specifications of the catastrophic event described in a notice published by TDI and TDI must inform the entity that is not covered by the notice published by TDI. TDI may disapprove a request if the nature of the event does not meet the definition of a catastrophic event or if TDI determines that the catastrophic event does not substantially interfere [that substantially interferes] with the entity's normal business operations, including claims submission or processing activities. TDI may limit a requested extension if the identified duration of interruption to claims submission or processing activities [normal business operations] is not proportional to the nature of the catastrophic event or if the identified duration of substantial interference with the normal business operations is not proportional to the nature of the catastrophic event.

f. Other suggested amendments to the rule.

Next, we suggest that it would also be helpful to establish in rule, a requirement for any notification submitted to TDI by an entity that TDI learns is not subject to the parameters or specifications of the catastrophic event described in a notice published by TDI, or disapproval or limitation of a request, to be accompanied by a detailed explanation of TDI’s rationale for not recognizing the notification, or disapproving or limiting a request, as well as a process for appealing TDI’s decision. Without requiring TDI to explain its rationale, it is likely entities will claim TDI’s decisions are arbitrary. We thus recommend requiring TDI to issue a rationale, accompanied by instructions of the appeals process, for entities that receive an adverse determination.

To implement TMA’s suggestions above, TDI should amend 28 TAC 21.2819 by adding new subsection (f), to read as follows:

(f) If TDI informs an entity that the entity is not subject to the parameters or specifications of the catastrophic event described in a notice published by TDI, or if TDI disapproves or limits an extension asked for in a request, TDI shall provide the entity with a detailed explanation of the rationale relied on for not recognizing the notification, disapproving the request, or limiting the requested extension, accompanied by a statement informing the entity of its right to, and how to appeal the decision. Upon receiving a rationale for not recognizing a notification, or disapproval or limitation of an extension asked for in a request, an entity shall have five days to submit an appeal TDI at PromptPay.tdi.texas.gov.

An appeals process is crucial to avoid claims that TDI's review process is a "black box" that unilaterally, and without recourse, decides the impact of a certain event on an entity's ability to do business.

Finally, we note the reporting requirements in Section 21.2821(c)(17) still refer to the number of "certifications" of catastrophic events that an MCC must report to the Department. We recommend the Department make conforming amendments to this section, so it accurately refers to the number of notifications and requests sent to the Department.

II. Conclusion

Again, TMA thanks TDI for this opportunity to comment on the proposed rules relating to prompt pay deadlines extensions. If you have any questions, please do not hesitate to contact Kelly Walla, TMA Vice President and General Counsel, at kelly.walla@texmed.org; Erik Avots, TMA Assistant General Counsel, at erik.avots@texmed.org; or Ben Wright, TMA Director of Public Affairs, at ben.wright@texmed.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Keith A. Bourgeois".

Keith A. Bourgeois, MD
Chair, Board of Trustees, Texas Medical Association